

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SERVISIO SIMMON,

Plaintiff,

-against-

CAPTAIN MICHAEL MORALES #1300, NORMAN
JONES SHIELD 13056, DEP WARDEN JOHN
GALLAGHER #20, CHARLES CARTER, #10817,

Defendants.

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**ANSWER TO THE
AMENDED COMPLAINT**

07 CV 8832 (LAK)(GWG)

Jury Trial Demanded

Defendants Captain Morales, Correction Officer Jones and Correction Officer Carter, by their attorney, Michael A. Cardozo, Corporation Counsel of the City of New York, for their answer to the amended complaint, respectfully allege, upon information and belief, as follows:¹

1. Deny the allegations set forth in paragraph "I" of the amended complaint and all of its subparts, except admit that plaintiff purports to name the parties as stated therein.
2. Deny the allegations set forth in paragraph "II.A." of the amended complaint, except admit that plaintiff was incarcerated at Rikers Island on or about May 2, 2006.
3. Deny the allegations set forth in paragraph "II.B." of the amended complaint, except admit that plaintiff was incarcerated at the George R. Vierno Center on or

¹ By letter postmarked August 7, 2008 addressed to the Pro Se Office of the Southern District of New York, plaintiff requests dismissal of the claims against Deputy Warden John Gallagher. Accordingly, this answer is not submitted on behalf of Assistant Deputy Warden Gallagher, and, as Assistant Deputy Warden Gallagher is the only defendant alleged to have had personal involvement in an incident occurring on or about December 31, 2006, defendants Morales, Jones and Carter deny knowledge or information sufficient to form a belief as to the truth of the allegations concerning the December 31, 2006 incident alleged in the amended complaint.

about May 2, 2006 and that plaintiff was incarcerated at the Anna M. Kross Center on or about December 31, 2006.

4. Deny the allegations set forth in paragraph “II.C.” of the amended complaint, except admit that an incident involving plaintiff occurred on or about May 2, 2006 at approximately 1:00 p.m. in the George R. Vierno Center.

5. In response to paragraph “II.D.” on the first page labeled “3” of the amended complaint, regarding an incident on December 31, 2006, defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

6. In response to paragraph “III” on the first page labeled “3” of the amended complaint, defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

7. In response to paragraph “II.D.” on the second page labeled “3” of the amended complaint, regarding an incident on May 2, 2006, defendants deny the allegations contained therein, except admit that plaintiff was transferred from the Northern Infirmary Command to the George R. Vierno Center on or about May 2, 2006.

8. In response to paragraph “III” on the second page labeled “3” of the amended complaint, defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, except admit that plaintiff visited the clinic on or about May 2, 2006.

9. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “IV” of the amended complaint and all of its subparts.

10. Deny the allegations set forth in paragraph “V” of the amended complaint, except admit that plaintiff purports to seek relief as stated therein.

11. As plaintiff has not made any allegations in paragraph “VI” of the amended complaint, defendants submit that no response is required.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE:

12. The amended complaint fails to state a claim upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE:

13. Defendants Captain Morales, Officer Jones and Officer Carter have not violated any clearly established constitutional or statutory right of which a reasonable person would have known and therefore are protected by qualified immunity.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE:

14. At all times relevant to the acts alleged in the amended complaint, defendants acted reasonably in the proper and lawful exercise of their discretion.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE:

15. Any injury alleged to have been sustained resulted from plaintiff’s own culpable or negligent conduct and/or the intervening conduct of third parties and was not the proximate result of any act of the defendants.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE:

16. Plaintiff’s claims may be barred, in whole or in part, by his failure to exhaust his administrative remedies as required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE:

17. Plaintiff’s claims may be barred, in whole or in part, because plaintiff failed to comply with all conditions precedent to suit.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE:

18. Plaintiff's claims may be barred, in whole or in part, by the doctrines of res judicata and/or collateral estoppel.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE:

19. Plaintiff's claims may be barred, in whole or in part, by the applicable statute of limitations period.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE:

20. Plaintiff provoked any incident.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE:

21. Captain Morales, Officer Jones and Officer Carter had no personal involvement in the December 31, 2006 incident alleged in the amended complaint.

AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE:

22. Pursuant to plaintiff's letter addressed to the Pro Se Office of the Southern District of New York postmarked August 7, 2008, Assistant Deputy Warden Gallagher is no longer a defendant in this action.

WHEREFORE, defendants Captain Morales, Officer Jones and Officer Carter request judgment dismissing the amended complaint in its entirety, together with the costs and disbursements of this action, and such other and further relief as the Court may deem just and proper.

Dated: New York, New York
August 22, 2008

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
Attorney for Defendants Morales, Jones and Carter
100 Church Street
New York, New York 10007
(212) 788-1575

By: _____/s/
Bradford C. Patrick
Assistant Corporation Counsel
Special Federal Litigation Division

To: BY MAIL
Servisio Simmon, DIN #07A1347
Plaintiff Pro Se
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929

DECLARATION OF SERVICE BY FIRST CLASS MAIL

I, Bradford C. Patrick declare, pursuant to 28 U.S.C. § 1746, under the penalty of perjury that on **August 22, 2008** I served the annexed **Answer to the Amended Complaint** upon the following individual by depositing a copy of the same, enclosed in a first class postpaid properly addressed wrapper, in a post office/official depository under the exclusive care and custody of the United States Postal Service, within the State of New York, directed to the said plaintiff pro se at the address set forth herein, being the address designated by said plaintiff for that purpose, to wit:

Servisio Simmon, DIN #07A1347
Plaintiff Pro Se
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929

Dated: New York, NY
August 22, 2008

_____/s/
Bradford C. Patrick
Assistant Corporation Counsel
Special Federal Litigation

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-against-

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JONES SHIELD 13056, DEP WARDEN JOHN
GALLAGHER #20, CHARLES CARTER, #10817,

Defendants.

ANSWER TO THE AMENDED COMPLAINT

MICHAEL A. CARDOZO

*Corporation Counsel of the City of New York
Attorney for Defendants Morales, Jones, and Alvarez
100 Church Street
New York, N.Y. 10007*

*Of Counsel: Bradford C. Patrick
Tel: (212) 788-1575
NYCLIS No.2007-040538*

Due and timely service is hereby admitted.

New York, N.Y., 200.....

..... Esq.

Attorney for.....